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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

BLACK RIVER QUARRY, INC.,
RESPONDENT

CIVIL PENALTY PROCEEDING

DOCKET NO. WEST 81-78-M

ASSESSMENT CONTROL NO.
45-00006-05006F

MINE: Black River Quarry

DECISION

Appearances: Ernest Scott, Jr. Esq.
Office of the Solicitor
United States Department of Labor
8003 Federal Office Building, Seattle,
Washington,
for the Petitioner

James L. Hawk President
Black River Quarry, Inc.
6808 South One Hundred Fortieth,
Seattle, Washington,
for the Respondent.

Before: Judge Virgil E. Vail

DECISION AND ORDER

STATEMENT OF THE CASE

This proceeding was brought by the Secretary of Labor pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. (hereinafter the Act), for assessment of a civil penalty for an alleged violation of a mandatory safety standard. A hearing was held on April 29, 1981 at Seattle, Washington. The respondent was not represented by counsel, however, James L. Hawk, President of the respondent company, appeared on its behalf.

At the conclusion of all of the evidence, the parties agreed to waive the filing of post hearing briefs and argued their respective positions relative to this case.

STIPULATIONS

The parties stipulated as follows:

1. That a proposed assessment was issued to the respondent and that respondent received a copy thereof.
2. Respondent admits paragraphs I and II in the petition for assessment in this case, which relate to jurisdiction.

FINDINGS OF FACT

1. Respondent operates a rock quarry business involved in drilling and blasting rock, which is crushed and sold primarily for road use.
2. Citation No. 586066 was issued to the respondent subsequent to a fatal accident which occurred on October 1, 1980, involving Clyde Knerson, (hereinafter referred to as "Knerson").
3. At the time that the above citation was issued, respondent employed approximately 23 to 24 employees and produced approximately a quarter of a million tons of material per year. The gross sales from production was approximately \$1,000,000 (Tr. 12).
4. Knerson was employed by the respondent in the capacity of a working foreman. He had worked for respondent for 30 years at various jobs including mechanic and crusher man (Tr. 26). Knerson also served as respondent's safety man (Tr. 35 and 45).
5. On October 1, 1980, Knerson was attempting to replace a defective right hydraulic cylinder on one of respondent's off-road trucks a 1963 Euclid, 16 cubic yard capacity, off-road, dump truck numbered 103 (Exhibits P-1 and R-A and Tr. 16).
6. The defective hydraulic cylinder was one of two which raises the box. To replace the cylinder, it is necessary to raise the box and remove the two pins from the respective ends of the cylinder (Tr. 22).
7. The box on the truck is counter-weighted so that when it is fully raised it is necessary to power it back down with the hydraulic cylinders (Tr. 20).
8. On the day of the fatal accident, Raymond Ballard drove the truck involved herein, to the respondent's yard to have the hydraulic cylinder repaired. He raised the box on the truck to its full height and left it that way to be repaired (Tr. 58).
9. Proper procedure for working on a truck with the box raised is to put a pin into a hole provided in the truck's frame and the box which prevents the box from falling (Tr. 20 and Exhibit R-C).

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10. Knerson was assisted in the repair work on the truck by John Calistro, a truck driver for the respondent.

11. Knerson first removed the hydraulic fluid hoses to the cylinders and then assisted Calistro in removing the top pin on the defective cylinder.

12. Knerson then hooked a "come-along" from the frame of the truck to the raised box. When the "come-along" is operated, it pulls down the raised box and releases pressure on the cylinder so that the bottom pin can be removed (Tr. 33).

13. Knerson stood on the frame of the truck under the box, and operated the "come-along" while Calistro went underneath to remove the pin. When Knerson applied pressure with the "come-along" the box fell crushing him between the box and frame and causing his death (Tr. 34).

14. The pin had not been placed in the frame of the truck to prevent the box from falling (Tr. 34).

15. Knerson was considered a competent, conscientious and safe worker by fellow employees (Tr. 48 and 50).

ISSUES

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of a mandatory safety standard occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred.

In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

DISCUSSION

Citation No. 586066(FOOTNOTE.1) charges the respondent with having violated mandatory safety standard 56.14-30. The standard provides that:

56.14-30 Mandatory. Men shall not work on or from a piece of mobile equipment in a raised position until it has been blocked in place securely. This does not preclude the use of equipment specifically designed as elevated mobile work platforms.

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The facts in this case are undisputed. All of the evidence shows that Knerson worked under the raised truck box without putting the pin that is provided to prevent or block the box from falling in place. I find that Knerson's actions were in violation of mandatory safety standard 56.14-30.

Respondent argues that they should not be held responsible for the negligent actions of its employees when such actions are contrary to its safety training and instructions. Further, the deceased employee was respondent's safety instructor, had an excellent safety record during his past 30 years of employment with the respondent and never evidenced this type of aberrant and unpredictable action. Also, respondent argues that the government cannot expect businesses to have employees who are totally infallible.

A careful review of all of the evidence in this case shows that the respondent was not negligent in this case. The deceased employee had been furnished safety instructions through courses given by the Mine Safety and Health Administration and had reviewed fatalgrams with his supervisor pertaining to the exact type of accident involved herein (Exhibit R-E). He had been asked prior to the accident by both Ballard and Calistro about placing the pin in the truck box to keep it from falling (Tr. 33 and 58).

However, the fact that the evidence fails to establish any negligence on the part of the respondent in this case does not result in a lack of liability on respondent's part for the violation of mandatory safety standard 30 C.F.R. 56.14-30. The Federal Mine Safety and Health Review Commission has held that an operator is liable for violations of the mandatory safety standards without regard to fault. *United States Steel v. Secretary of Labor*, 1 BNA MSHC 2151 (1979) and *Secretary of Labor v. Marshfield Sand and Gravel*, 1 BNA MSHC 2475 (1980).

Further, I concur with the decision reached by Judge Cook in *Secretary of Labor v. Ben M. Hogan Company, Inc.*, 3 FMSHRC 1121 (1981). Judge Cook considered a similar set of facts to the case here under consideration. An employee, while sitting on the tire of a loader was attempting to work on the engine with the transmission in gear and the bucket raised. The loader was not blocked or turned towards a bank and started ahead pulling the employee into the machine causing his death. Judge Cook found that the respondent demonstrated no negligence in that case. However, he found that this does not result in a lack of liability for the violation of a mandatory safety standard. He pointed out that it has consistently been held that a mine operator may be held liable for a violation of a mandatory safety standard regardless of fault. *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 2 BNA MSHC 1132 (1981), *United States Steel Corporation*, 1 FMSHRC 1306, 1 BNA MSHC 2151, 1979 CCH OSHD par. 23,863 (1979).

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As to assessing a penalty in such a case as this where the respondent is found not to have been negligent, the Act has addressed the question in Section 110 which contains the Act's major penalty provisions. In mandatory terms, section 110(a) directs the Secretary, who has enforcement responsibility under the Act, initially to assess a penalty for each violation; section 110(i) similarly provides that the Commission, which has adjudicative responsibility, "shall have authority to assess all civil penalties in (the) Act."(FOOTNOTE.2)

The language of the two sub-sections ___ under the language of all of section 110 ___ is plainly based on the premise that a penalty will be assessed for each violation at both the Secretarial and Commission levels. Secretary of Labor v. Tazeo, Inc. Docket No. VA 80-121 (1981). The Mine Act's legislative history shows that Congress intended a mandatory penalty structure. Congress consistently described penalties as mandatory. In general, see Senate Subcommittee on Labor, Comm. on Human Resources, 95th Cong. 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 85, 88, 375-376, 600-601, 629, 910, 1167, 1211-12, 1364-65 (1978) ("Leg. Hist."). The Review Commission stated in Tazeo, Inc., supra, that both the text and legislative history of section 110 make clear that the Commission and judges must assess some penalty for each violation found.

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Accordingly, the respondent is found to be liable for the violation of mandatory safety standard 30 C.F.R. 56.14-30.

In determining the amount that should be assessed as a civil penalty, I find as follows:

A. History of Prior Violations

Although there was no direct proof as to the number of prior violations acquired by the respondent, there was testimony by its president that there were some payments made (Tr. 13). I conclude that the history of prior violations did not warrant any increased civil penalty assessment in this case.

B. Size of Business

The parties agreed that the mine in question employed 23 to 24 people at the time of the violation and had sales of a gross amount of \$1,000,000. However, at the time of the hearing, the employees were reduced in numbers due to a depressed demand for its products from the construction industry. In 1980 the respondent's size in terms of production was a quarter of a million tons. I conclude that the respondent was a small to medium sized operator.

C. Good Faith Compliance

The respondent demonstrated good faith in this instance by immediately calling all employees together after this accident and instructing them on the proper method of blocking dump trucks before working on them.

D. Negligence

The record supports a finding that the respondent was not negligent in causing this accident. The MSHA inspector testified that he did not give them much for negligence because he was convinced it was respondent's policy to pin the raised truck beds before working on them (Tr. 47). However, as stated above, the lack of negligence on the respondent's part does not avoid the assessment of a penalty.

E. Gravity

In view of the fatal accident which resulted, it is found that the violation was extremely serious. Further, with the other employee, Calistro, working under the truck the possibility of his injury or death existed.

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F. Effect on Operator's Ability to Continue in Business

The respondent's president testified that paying a penalty would not affect their ability to continue in business (Tr. 13). I find that a penalty properly otherwise assessed in this proceeding will not impair the operator's ability to continue in business.

Penalty Assessed

Upon consideration of the entire record in this case, I find that assessment of a penalty of \$400.00 is warranted.

ORDER

The respondent is ORDERED to pay a civil penalty of \$400.00 within 30 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

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~FOOTNOTE ONE

On October 1, 1980 about 12:45 p.m. an employee of Black River Quarry, Inc. was crushed to death while changing the right hydraulic cylinder on a 16 cubic yard capacity 1963 model TO-63 Euclid dump truck numbered 103. The victim was positioned between the raised, unblocked dump bed and the truck frame when the left hydraulic cylinder failed and the truck bed fell.

~FOOTNOTE TWO

Section 110(a) provides in relevant part:

The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than \$10,000 for each such violation

Section 110(i) provides:

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.